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Teh Hock Leong v Public Prosecutor

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–52 OF 2008(B)
ARIFIN ZAKARIA CJ (MALAYA), MOHD GHAZALI AND JAMES FOONG FCJJ
23 OCTOBER 2009

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Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Whether conduct of appellant in not trying to escape or putting up a struggle relevant to show absence of knowledge of drugs — Whether reasonable doubt raised as to appellant's knowledge that he was carrying drugs — Whether weight of drugs properly established

D

Criminal Law — Dangerous Drugs Act — s 37(da) — 580.3g of methamphetamine — Trafficking — Presumption under s 37(d) of the Dangerous Drugs Act 1952 — Positive finding of possession — Whether knowledge of drugs proved — Whether finding of trafficking triggered by weight of drugs

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Evidence — Inference — Conduct of appellant — Trafficking in dangerous drugs — Whether conduct of appellant in not trying to escape or putting up a struggle relevant to show absence of knowledge of drugs

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The appellant was stopped by the police at the flight arrival gate at KLIA where the appellant had arrived on an incoming flight. They found a plastic bag containing three wet towels and three pairs of wet underwear in his backpack emitting a strong acidic odor. The appellant was arrested and subsequent examination found them to be laced with 580.3g of methamphetamine. The appellant was charged for trafficking in the said drugs. He was found guilty by the High Court and was sentenced to death. His appeal to the Court of Appeal was dismissed, hence this appeal. Appellant's counsel raised the following four grounds of appeal: (i) that the earlier courts had failed to consider the contemporaneous conduct of the appellant in not trying to escape or putting up a struggle with the police; (ii) the investigating officer ('PW7') had testified that he did not weigh the items found in the backpack when he received them from the arresting officer PW5. He was told by PW5 that they were 2.4kg, but when the appellant was charged in the magistrates court, the weight was listed as 2.8kg. Finally, when the chemist testified, the weight of the drugs was only 580.3g; (iii) that it was

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doubtful whether the learned trial judge had found a prima facie case of trafficking or possession; and (iv) that the trial judge failed to appreciate the appellant's defence that the towels and underwear were handed over to him by his Thai wife.

Held, dismissing the appeal:

(1) The appellant was confronted by the police at the arrival gate which is a tight and restricted area with hardly any room for the appellant to make a successful escape. The appellant's chances of a quick getaway were minimal since he was escorted and was within the restricted vicinity of the KLIA building. Any attempt by the appellant to throw away or disassociate himself with the backpack would have been evidently noticeable. Further, since the drugs were so cunningly concealed, there could be no necessity to take such drastic actions which may attract instant suspicion. Therefore, the appellant's docile conduct throughout the period did not infer an absence of knowledge of the drugs (see para 5).

(2) What was vital was the amount of drugs extracted, not the weight of the wet items. The weight of these drugs had been positively ascertained by the chemist to be 580.3g and it was upon this weight that the appellant was charged for trafficking (see paras 7–10).

(3) The trial judge had made a positive finding that the appellant was in possession of the said drugs. In relation to trafficking, the trial judge proceeded to mention the presumption set out in s 37(da)(xvi) of the Dangerous Drugs Act 1952 ('DDA'). The trial judge expressed that his finding of trafficking was triggered by the weight of the drugs. He could not have been referring to the presumption of possession since he had already made a positive finding of this earlier. Further, by making specific reference to s 37(da)(xvi) of the DDA, which is a provision on the presumption for trafficking and not for possession he could not be associating with the latter (see paras 11 & 13).

(4) The claim of the existence of the appellant's Thai wife was not the essential part of the defence. What was pertinent was whether he had knowledge that the wet items in his backpack contained the incriminating drugs. He had failed to raise a reasonable doubt that he had no knowledge that what he was carrying was drugs (see para 17).

[Bahasa Malaysia summary

Perayu dihentikan oleh polis di pintu ketibaan penerbangan di KLIA di mana perayu tiba dengan penerbangan masuk. Mereka menemui satu beg plastik

A mengandungi tiga tuala basah dan tiga seluar dalam basah dalam beg sandangnya yang mengeluarkan bau asid yang kuat. Perayu ditangkap dan siasatan kemudiannya mendedahkan bahawa ianya dibubuh dengan 580.3g of methamphetamine. Perayu dituduh kerana mengedar dadah berkenaan. Dia didapati bersalah oleh Mahkamah Tinggi dan dijatuhi hukuman mati. B Rayuannya kepada Mahkamah Rayuan ditolak dan oleh itu rayuan ini dibuat. Peguam perayu mengemukakan empat alasan bagi rayuan seperti berikut: (i) bahawa mahkamah terdahulu gagal untuk mempertimbangkan tindakan semasa perayu untuk tidak mencuba melarikan diri atau bergelut dengan polis; (ii) pegawai penyiasat ('PW7') telah memberi keterangan C bahawa dia tidak menimbang barang-barang yang ditemui dalam beg sandang apabila dia menerimanya daripada pegawai tangkapan PW5. Dia diberitahu oleh PW5 bahawa ianya seberat 2.4kg, tetapi apabila perayu dituduh di mahkamah majistret, berat dicatatkan sebagai 2.8kg. Akhirnya, apabila ahli kimia memberi keterangan, berat dadah tersebut hanya 580.3g; D (iii) bahawa adalah meragukan sama ada hakim perbicaraan yang bijaksana telah mendapati kes prima facie pengedaran atau milikan; dan (iv) bahawa hakim perbicaraan gagal untuk mengamati pembelaan perayu bahawa tuala-tuala dan seluar dalam-seluar dalam tersebut diberikan kepadanya oleh isterinya yang berketurunan Thai.

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Diputuskan, menolak rayuan:

(1) Perayu berdepan dengan pihak polis di pintu ketibaan yang merupakan F kawasan sempit dan terhad tanpa terdapat sebarang ruang untuk perayu melarikan diri. Peluang perayu untuk melarikan diri adalah minimum memandangkan dia diiringi dan berada dalam kawasan terhad dalam bangunan KLIA. Apa-apa cubaan oleh perayu untuk membuang atau meninggalkan beg sandang tersebut akan kelihatan jelas nyata. G Selanjutnya, memandangkan dadah tersebut disembunyikan secara licik, maka tiada keperluan untuk membuat tindakan drastik yang mungkin akan segera menimbulkan keraguan. Oleh itu, tindakan perayu yang patuh sepanjang tempoh tersebut tidak menunjukkan ketiadaan pengetahuan mengenai dadah tersebut (lihat perenggan 5).

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(2) Apa yang penting adalah jumlah dadah yang diekstrak, bukannya berat basah barang-barang tersebut. Berat dadah tersebut secara positifnya telah dipastikan oleh ahli kimia seberat 580.3g dan berdasarkan berat ini perayu dituduh kerana mengedarnya (lihat perenggan 7–10).

I (3) Hakim perbicaraan membuat dapatan positif bahawa perayu memiliki dadah tersebut. Berhubung dengan pengedaran, hakim perbicaraan membicarakan anggapan yang dinyatakan dalam s 37(da)(xvi) Akta Dadah Berbahaya 1952 ('ADB'). Hakim perbicaraan menyatakan dapatannya mengenai pengedaran yang diusulkan melalui berat dadah

tersebut. Beliau tidak dapat merujuk kepada anggapan milikan memandangkan beliau telah membuat dapatan positif mengenai perkara ini terlebih dahulu. Selanjutnya, dengan membuat rujukan khusus kepada s 37(da)(xvi) ADB, di mana merupakan peruntukan untuk mengedar dan bukannya milikan, beliau tidak dapat mengaitkkannya dengan milikan (lihat perenggan 11 & 13).

(4) Pernyataan mengenai kewujudan isteri perayu yang berketurunan Thai bukan merupakan bahagian penting dalam pembelaan. Apa yang penting ialah sama ada dia mempunyai pengetahuan bahawa barang-barang basah dalam beg sandangnya mengandungi dadah. Dia gagal untuk menimbulkan keraguan yang munasabah bahawa dia tidak mempunyai pengetahuan bahawa apa yang dibawanya adalah dadah (lihat perenggan 17).]

Notes

For cases on inference generally, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1791–1793.

For cases on s 37(da), see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 220–230.

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

Cases referred to

Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (folld)

Legislation referred to

Dangerous Drugs Act 1952 s 37(da)(xvi)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.

Ahmad Bache (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

James Foong FCJ (delivering the judgment of the court):

INTRODUCTION

[1] The appellant was charged for trafficking in 580.3g of methamphetamine at the Kuala Lumpur International Airport ('KLIA') on 27 June 1999. He was found guilty by the High Court and was sentenced to death. His appeal to the Court of Appeal was dismissed; hence this appeal.

[2] The facts of this case are briefly these: on information received, PW5, the head of the narcotics division in the KLIA, and two of his men waited at flight arrival gate 'B6' in the KLIA. When the appellant appeared, he was

A stopped by PW5. The appellant was carrying a backpack. When this backpack was examined in the office of PW5 in the KLIA, PW5 found, aside from some clothing, a plastic bag containing three wet towels and three pairs of wet underwear. These emitted a strong acidic odor. PW5 was suspicious that they may be laced with drugs. He arrested the appellant and when these B wet items were subsequently examined by the government chemist they were found to contain 580.3g of methamphetamine.

[3] Before us, appellant's counsel raised four grounds in this appeal.

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[4] First, he contended that the High Court and the Court of Appeal had failed to consider the contemporaneous conduct of the appellant in not trying to escape or putting up a struggle with the police when confronted by PW5 and his men or attempting to disassociate or discard the backpack D containing the dangerous drugs. Such conduct, if considered by the courts below, could infer that the appellant had no knowledge of the said drugs in the backpack.

[5] It is our view that in order to draw a favourable inference from the E appellant's contemporaneous conduct, his action or inaction must be examined in the light of the situation at the material time. The area where the appellant was confronted by PW5 was the arrival gate of an incoming flight in the KLIA. This was the only exit point where passengers disembarking the plane can enter the KLIA terminal. It is common knowledge that the area was F tight and restricted with hardly any room for the appellant to make a successful escape even if he had tried. From here the appellant was then taken by PW5 and his men to PW5's office in the KLIA. The approximate walking distance was 600–800 metres. Here again the appellant's chances of a quick getaway were minimal since he was escorted and was within the restricted G vicinity of the KLIA building. And, if the appellant were to attempt to throw away or disassociate himself with the backpack during this entire duration described it would evidently be noticeable. Of course, since the drugs were so cunningly concealed, there could be no necessity to take such drastic actions which may attract instant suspicion. So against these circumstances, the H appellant's docile conduct throughout the period described could not have inferred an absence of knowledge of the said drugs. For this reason there is no misdirection by the courts below.

[6] The second ground of appeal raised by the appellant's counsel concerns I the weight of the wet items found in the backpack. The investigating officer ('PW7') has testified that he did not weigh these items himself when he received them from the arresting officer PW5. He was told by PW5 that they were 2.4kg. But when the appellant was first charged in the magistrate court, the weight of these items was listed as 2.8kg. Finally, when the chemist

('PW2') testified, the weight of the drugs was only 580.3g. Against these, appellant's counsel submitted that between the time when the wet items were handed over to PW7 to the time when the appellant was first charged in the magistrate court, the weight of the items had increased by 400g and this 'unexplained discrepancy had prejudiced the appellant in that a larger amount had been sent to the chemist for analysis'.

[7] On this issue, it is important to highlight a few pertinent facts. First, is the need to distinguish the weight of the drugs from the weight of the wet items found in the backpack. The chemist has testified that he has to extract the drugs from these wet items. The drugs were soaked in these wet items. So it is obvious that the weight of the drugs cannot be similar to the weight of the wet items as the materials in which the drugs were soaked has to be deducted. Therefore, what is vital in this case is the amount of drugs extracted, not the weight of the wet items.

[8] Next, the weight of the wet items amounting to 2.4kg was not personally deduced by PW7 himself. He did not weigh these personally at the material time. He was only told of this by PW5.

[9] Thirdly, when the appellant was first charged in the magistrate court, the weight of the drugs listed was only tentative. It was subject to confirmation by the chemist who, as we have said, had to extract the drugs from the wet items in order to ascertain the actual amount of drugs contained therein.

[10] So out of all these, what is important is not the weight of the wet items but the weight of the drugs found in them. The weight of these drugs has been positively ascertained by the chemist to be 580.3g and it is upon this weight that the appellant was charged for trafficking. Thus, we find no merit in this contention of the appellant.

[11] The third ground raised by the appellant concerns the word 'alternative' used by the trial judge in the following passage of his judgment:

> In my judgment, there is prima facie evidence of possession by the accused of 580.3g of methamphetamine. Hence *alternatively*, the presumption of trafficking under s 37(da)(xvi) of the DDA applies. (Emphasis added.)

For this, appellant's counsel contented that it 'is doubtful whether the learned trial judge has found a prima facie case of trafficking or possession because:

(a) no where in the reasons given by the learned trial judge did His Lordship say in clear terms, that this is a case of actual trafficking without relying on the presumption;

A (b) the learned trial judge also did not refer to the various acts of trafficking under s 2 of the Act;

(c) that the learned trial judge relied on the trafficking presumption under s 37(da)(xvi) of the Act only as an alternative'.

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[12] Before this cited passage of the trial judge, we found the following being expressed by him:

> Based on the evidence of the prosecution, I was satisfied that the prosecution has made out a prima facie case.
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> On the evidence, there can be no doubt whatsoever that the accused was carrying the drug at the material time and place as stated in the charge. The only question is: did the accused know that he was carrying methamphetamine? In my opinion, from the whole of the evidence, in particular, the evidence of the wet items, prima facie, the accused knew that what he was carrying was methamphetamine. Turning
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> the methamphetamine into a solution and thereafter, having those towels and underpants soaks with the solution was a cunning way of carrying the prohibited drug. The objective was clearly to avoid detection by the authorities.

E **[13]** From these, we are of the opinion that the trial judge had made a positive finding that the appellant was in possession of the said drugs within the meaning as expressed by Lord Diplock in *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 at p 69 where both actus rea and mens rea were present at the time of the commission

F of the offence. Now whether the appellant was trafficking in the said drugs, the trial judge then proceeded to mention the presumption set out in s 37(da)(xvi) of the Dangerous Drugs Act 1952 ('DDA'). In our opinion, the choice of the word 'alternative', perhaps, is not the most appropriate but for all intent and purpose by reading this with the previous sentence and the

G contents of the passages highlighted earlier, we are satisfied that the trial judge was expressing his finding of trafficking triggered by the weight of the drugs as provided by the cited provision of the law. He could not be referring to the presumption of possession since he has already made a positive finding of this earlier. Further, by making specific reference to s 37(da)(xvi) of the DDA,

H which is a provision on the presumption for trafficking and not for possession he could not be associating with the latter. So for these reasons, we reject this ground of appeal.

[14] The final ground raised in this appeal concerns the failure of the trial

I judge to adequately appreciate the defence raised by the appellant. The appellant has testified that he has just returned from a visit to his wife in Chiang Mai, Thailand. While in Thailand, he received a telephone call from a friend called Ah Keong who requested him to bring back to Malaysia some items he left behind in Thailand. These items were subsequently delivered by

someone to his wife's restaurant in Chiang Mai. His wife then handed these to him and he placed them in the backpack. The trial judge however, despite the presence of his marriage certificate with a Thai lady and, a passport of this same person, as well as a statutory declaration that he is married to this lady in his backpack said:

> To my mind, the story as given by the accused is inherently incredible. It does not make sense. Thus I am inclined to hold the view that the story about having a friend by the name of Ah Keong and having a Thai wife is nothing but a mere fabrication.

[15] This, submitted by appellant's counsel 'is against the weight of the evidence'.

[16] This same issue was canvassed before the Court of Appeal. The Court of Appeal dismissed it in this fashion:

> It was absolutely essential for the prosecution to introduce the documents in question as part of the unfolding of its case. However in the course of considering the defence explanation it became fairly clear that the story put forward was wholly incredible for the reasons given by the learned judge which we find unnecessary to repeat here. Once the explanation failed on its own inanition, the existence or non existence of the wife bore no relevance to the existence or otherwise of Ah Keong. The learned judge held that Ah Keong did not exist, the defence of innocent carrier raised by the appellant fell to the ground.

[17] We are in agreement with the views expressed above. The claim of the existence of the appellant's Thai wife is not the essential part of his defence. What is pertinent was whether he has knowledge that the wet items in his backpack contained the incriminating drugs. And for this, he told in his defence of the existence of a person called Ah Keong. The trial judge disbelieved this. So whether the appellant is married to a Thai lady or otherwise is not the essence of his defence. He must raise a reasonable doubt that he has no knowledge that he was carrying was the said drugs, a matter which the trial judge found that he failed to do.

CONCLUSION

[18] For reasons aforesaid, we dismiss this appeal and uphold the conviction and sentence passed by the High Court on the appellant.

Appeal dismissed.

Reported by Kanesh Sundrum